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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **ALDRIDGE CURRIE,** **Defendant and Appellant.**	**A123708** **(Contra Costa County Super. Ct. No. 5-962407-3)**

Appellant Aldridge Currie, a drug user, fatally shot Santos Maldonado, a drug dealer, as Maldonado sat in his car. Though appellant claimed to have acted in self defense, he was prosecuted for first degree special circumstance murder and other charges on the theory that he had killed Maldonado in order to steal his drugs and money. The prosecutor sought the death penalty. A jury convicted appellant of second degree murder, attempted robbery, and felon in possession of a firearm, and found true various enhancement allegations. (Pen. Code, §§ 187, subd. (a), 211, 12021, 667.5, subd. (b), 12022.5, subd. (a).)

The judgment was ultimately vacated by the Ninth Circuit Court of Appeals on a petition for writ of habeas corpus (28 U.S.C. § 2254) based on the prosecutor's improper use of a peremptory challenge under *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*). (*Currie v. Adams* (9th Cir. 2005) 149 Fed.Appx. 615.) Appellant was retried, convicted of the same charges and sentenced to prison for a term of 15 years to life plus 14 years.

In this appeal, appellant raises the following contentions: (1) the prosecutor again committed error under *Batson, supra,* 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) by excusing a prospective juror on racial grounds; (2) the prosecution acquired information about the defense through an illegal search of appellant's prison cell while he was awaiting retrial, and this court must review sealed records of an in camera hearing concerning that search from which the defense was excluded; (3) the court should have granted the defense motion to recuse the prosecutor and his office; (4) the trial court admitted prejudicial evidence of appellant's prior acts of violence in the mistaken belief that such evidence was admissible under Evidence Code section 1103, subdivision (b); (5) the cumulative effect of the above errors requires reversal; (6) additional conduct credits must be awarded; and (7) the abstract of judgment does not accurately reflect the offenses of which appellant was convicted. We agree that appellant is entitled to additional credits and that the abstract must be modified; otherwise, we affirm the judgment.

FACTS

Santos Maldonado and his girlfriend Ami Jurica dealt drugs together in the Pittsburg area. Both were acquainted with appellant, who had purchased drugs from them, and with Jerry Silva, a fellow dealer who often used drugs with them.

On the evening of July 12, 1995, Jurica and Maldonado were sitting in Maldonado's car, selling drugs in front of Silva's house. Maldonado had a handgun with him, as he always did. John Marshall, another drug user, was working nearby on Silva's car.

Appellant was also in the area that evening. He and Maldonado argued about a gun that Maldonado had acquired from Silva, and the two men went inside Silva's home to try to resolve their dispute. When they left the house, Marshall approached Maldonado to buy methamphetamine. During the transaction (which took place in the car) Maldonado pulled out a gun and showed it to Marshall while appellant was standing about 13 feet away.

Appellant then approached Maldonado and asked him how much methamphetamine he would sell for $100. Maldonado replied he would sell appellant an "eight ball," or three and one-half grams. Appellant left, telling Maldonado he had money around the corner. He returned in a few minutes and fatally shot Maldonado in the neck with a handgun.

According to Jurica, she and Maldonado were just sitting in the car listening to music when appellant returned and came up behind Maldonado. Maldonado did not have his gun in his hand and had not pointed it at appellant. After he shot Maldonado, appellant ripped a gold chain off Maldonado's neck, searched through his pockets, and took Maldonado's gun along with some money and methamphetamine. Jurica also gave appellant some money that she had. Appellant then pointed a gun at Jurica and left the scene. Jurica did not think appellant was under the influence of drugs, but he appeared to be desperate to get some.

After appellant fled, Jurica drove the car to a pay phone and called 911. Maldonado was taken to the hospital, but died as a result of the gunshot wound in his neck. Police did not find any drugs, guns or money on Maldonado, nor did they find any drugs or guns in his car. Maldonado's gold neck chain was found broken on the driver's seat. Jurica told the police that appellant was the shooter and gave them his description.

Meanwhile, appellant ran to the nearby house of his friend Phillip Drake. He arrived excited, sweating and breathless, and was carrying two guns. Wendy Nguyen, who was also present, heard appellant say that he had just shot Maldonado in the neck and had taken his dope and robbed him. Asked why he had done so, appellant said that Maldonado had been putting him down. According to Nguyen, appellant did not mention anything about self-defense. After hiding the guns, appellant smoked some drugs in a bedroom closet.

Appellant was arrested on the street shortly before midnight, and a search of his pants pocket revealed $90, in denominations of two twenties, two tens, and thirty ones, some of which tested positive for the presumptive presence of blood. A handgun was

recovered in a utility box near the location where he was first spotted, which forensic testing showed to be consistent with the bullet removed from Maldonado's body.

During his retrial on second degree murder and related charges, appellant admitted shooting Maldonado, though he claimed to have done so in self-defense because he was afraid Maldonado was going to shoot him first. Appellant testified that when he approached the car, Maldonado had his gun in his hand, raised it, cocked the hammer, and pointed it in appellant's face. Appellant stepped back and fired a single shot, then ran away without taking anything from the car. He hid his gun in the utility box because he had not wanted to take it into his friend's apartment.

Appellant also testified that he was apprehensive because he had been shot four times before and because Maldonado had threatened him. The claim about the prior threat was bolstered by appellant's friend Douglas Roundtree, who testified that Maldonado had confronted him about being a "snitch" in appellant's presence, and had threatened to kill appellant for being a snitch's friend.

A toxicologist testified that Maldonado's blood contained methamphetamine and a methamphetamine metabolite at the time of his death and that appellant's contained cocaine and a cocaine metabolite. The levels were sufficient to show chronic use in both men, which could cause symptoms of irritability, obsessive compulsive behavior, insomnia, aggression, violence, restlessness, hypervigilance, hallucinations, delusions, paranoia and psychosis, as well as an inability to make rational judgments.

The jury learned that appellant had been convicted of several felonies, including the possession and transportation of drugs, possession of a firearm by a felon and receiving stolen property. Evidence was also presented that appellant had threatened correctional officers while in custody and had fought with a fellow inmate in state prison.

DISCUSSION

I. *Batson/Wheeler Claim*

As explained in *Batson* and *Wheeler*, both the state and federal constitutions bar peremptory challenges that are based on a juror's race or membership in a similar cognizable class. (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*); *Batson*, *supra*,

476 U.S. at p. 97 [violation of equal protection]; *Wheeler*, *supra,* 22 Cal.3d at pp. 276-277 [violation of right to jury drawn from representative cross-section of community].) A defendant who suspects that a juror has been challenged for a racially discriminatory reason must raise an objection (commonly known as a *Batson* or *Wheeler* motion) at which point the trial court will analyze the claim using a familiar three-prong test: "First, [it] must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden then shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination." (*Lenix*, at p. 612.)

Appellant, who is African-American, contends the prosecutor used a peremptory challenge to exclude an African-American juror on racial grounds. He claims that the denial of his *Batson/Wheeler* motion violated his constitutional rights and requires reversal of the judgment. We disagree.

A. *Procedural History*

In reviewing a ruling on a *Batson/Wheeler* motion, we are typically limited to the record of what happened in the course of the voir dire during which the peremptory challenge was exercised. This case has a more complex history, and requires us to look at previous proceedings in the case at hand, as well as the prosecutor's actions in an unrelated case.

Appellant was originally convicted of second degree murder in a trial that ended in 1998, in which the People were represented by the same prosecutor. The original judgment was affirmed on direct appeal (*People v. Currie* (A084426, Jan. 30, 2001) nonpub. opn.), but was ultimately reversed by the Ninth Circuit Court of Appeals in a 2 to 1 decision in which the majority concluded the prosecutor had violated *Batson* by excusing an African-American juror based on her race. (*Currie v. Adams, supra,* 149 Fed.Appx. 615.) Although the prosecutor had stated during the first trial's voir dire that he excused the juror because she was undecided about the death penalty (which the prosecution was then seeking based on the first degree special circumstance murder

charge), two male Caucasian jurors who had expressed opposition to the death penalty were left on the panel. In light of the failure to challenge these other two jurors, the majority of the Court of Appeals panel concluded the prosecutor's stated reason for striking the African-American juror was pretextual and that the challenge was motivated by race. (*Ibid*.)[1]

The case was remanded and retrial commenced in 2008, with the same prosecutor again assigned as the trial deputy. During voir dire, defense counsel objected on *Batson/Wheeler* grounds after the prosecutor used a peremptory challenge to excuse Juror C., an African-American woman. The prosecutor explained that he had graded prospective jurors based on their questionnaires and that Juror C. had scored lower than many because some of her answers were inconsistent, she had no opinion regarding self-defense and psychiatric testimony, and she had commented that the defendant was due a fair trial. The trial court granted a defense motion for mistrial after comparing Juror C.'s responses to those of others who remained on the panel (see *Snyder v. Louisiana* (2008) 552 U.S. 472, 477, regarding comparative juror analysis), and concluded "the excusal of [Juror C.] likely was not race neutral because the reasons given . . . cannot be distinguished from other jurors who have not been excused."

Defense counsel then filed a motion to recuse the prosecutor and his office based in part on his history of using peremptory challenges to excuse African-American jurors. Counsel presented evidence that the prosecutor had also been the trial deputy in *People v. Johnson*, a murder case that eventually was reversed by the United States Supreme Court on *Batson/Wheeler* grounds. (*Johnson v. California* (2005) 545 U.S. 162, 170 (*Johnson*).) In *Johnson*, reversal was necessitated because the trial judge had imposed too stringent a standard when determining whether the defense had established the prima facie case of discrimination necessary to prevail under *Batson/Wheeler*. (545 U.S. at p. 170.) When that case was ultimately remanded to the trial court with instructions to assume a prima facie case had been established and to conduct an analysis under the

[1] We grant appellant's request for judicial notice of these prior proceedings.

second and third prongs of the *Batson*/*Wheeler* test (see *People v. Johnson* (2006) 38 Cal.4th 1096, 1103-1104), the superior court vacated the conviction and ordered a new trial after concluding that at least one of the peremptory challenges appeared to have been exercised for a discriminatory reason.

After considering this evidence, the trial court denied the motion to recuse the prosecutor. In making its ruling, it amplified its views of the *Batson/Wheeler* error leading to the mistrial after the first round of voir dire on retrial: "[A]t the time I granted the *Wheeler* motion in the present case, I accept and accepted and do accept [the prosecutor's] description of his reasons for striking the juror that prompted the *Wheeler* motion. . . . I believe and credit that he has a grading system that he uses for all jurors, and that his reasons for striking [Juror C.], who was the juror that led to the *Wheeler* motion, was that there were people in the six-pack who he had graded more highly than [Juror C.] and it was his goal to get those people on the jury of 12. [¶] . . . . [¶] My opinion, as I articulated at the time, however, is that the law requires me to go behind the grading system and inquire as to the reasons for the grade, and then to conduct the comparative analysis of those reasons against all the other jurors who are in similar situations or answered questions similarly. . . . I did conduct a comparative analysis and found that the reasons for [Juror C.'s] grade being lower than other jurors' grades did not withstand the analysis."

Trial recommenced and a new jury panel was called. During this second round of voir dire, Juror J., a 31-year-old African-American woman, was seated for questioning. Juror J. had stated on her questionnaire that she was a college graduate employed as a sales manager, who had a 12-year-old daughter. Juror J. had friends and family members who had been arrested for drug related issues, but she believed they had been treated fairly by the criminal justice system. Juror J. also indicated that several members of her family had a problem with crack cocaine, and that her attitude about illegal drug use was that it "was very sad" but "to each his own." She wrote that she believed that groups such as Blacks and Hispanics were wrongfully targeted by the police in Contra Costa County. Responding to a question as to whether the fact of appellant's arrest and

prosecution caused her to believe he was probably guilty of something, she checked "no" and wrote as a comment, "No, I don't know what [he] is accused of and he is presumed not guilty until proven."

During his questioning of Juror J., the prosecutor asked her whether she could follow the court's instruction to disregard appellant's being brought to trial in 2008 for crimes committed in 1995. She said she understood that she was supposed to disregard the time gap, but was not sure she could. The following day, the prosecutor informed the court that because he had run out of time the day before, he had not questioned Juror J. about the statement in her questionnaire that she had relatives who had been charged with criminal offenses, nor had he asked her about an apparent discrepancy between that response and another in which she indicated that neither she nor anyone close to her had been a defendant in a criminal case. The court asked additional questions of Juror J., who explained that she had been referring to her brother and her cousin, that her brother had been "out of Alameda [C]ounty" about six years ago, and that her cousin was now deceased (although not for any reason relating to his case). She stated that she believed both had been treated fairly and that neither case would interfere with her ability to serve as a juror.

The prosecutor ultimately exercised a peremptory challenge against Juror J. Defense counsel brought a motion under *Batson/Wheeler*, observing that she was the only African-American on the panel, the others having been excused for hardship reasons. The prosecutor responded that the striking of a single juror did not demonstrate a pattern of excluding African-Americans. The trial court denied the motion, finding no prima facie case of discrimination. It noted that striking a single person for racial reasons would support a prima facie case if the circumstances gave rise to a reasonable inference that the challenge was made on racial grounds, but in the case of Juror J., there was an obvious reason for the prosecutor's challenge: her brother and a cousin had both been prosecuted for drug offenses.

The trial court acknowledged that Juror J. had stated she believed her brother and cousin were treated fairly, but "I think there is a very reasonable basis to strike someone

who has relatives who have been prosecuted even when they say that they felt it was fair and that would not prevent them from being objective in this case. I think it is a reasonable race neutral reason to strike anyone who has a close relative who has been prosecuted. [¶] So for that reason based on my observation of the facts, I don't believe a prima facie case has been made." The court clarified that in making its ruling, it had considered the prosecutor's history with respect to *Batson/Wheeler* issues, including the Ninth Circuit's order vacating the first judgment, the mistrial granted on *Batson/Wheeler* grounds during the first round of jury selection on retrial, and the prosecutor's conduct in the *Johnson* case .

After determining that no prima facie case had been made, the court allowed the prosecutor to articulate for the record his reasons for excluding Juror J. The prosecutor stated that in addition to the reasons noted by the court, Juror J. had indicated that several family members had used crack cocaine; that she had commented that she did not know what appellant was accused of even though the charges had been read to the panel; that one of the persons she knew who had been prosecuted was a brother, a very close relative; and that her answers on the questionnaire appeared inconsistent as to whether she or a family member had been a "victim, witness or defendant" in a criminal matter. The court reiterated that it had not found a prima facie case of discrimination and found, moreover, that "the reasons provided are race neutral and are not a sham or a pretext, but are the actual reasons that [the prosecutor] exercised the peremptory challenge."

After the jury returned its verdict, the defense filed a motion for new trial arguing that the prosecutor committed several acts of misconduct, including the alleged *Batson/Wheeler* violation with respect to Juror J. In denying the motion, the court reiterated that it had found no prima facie case of discrimination where the drug arrests of family members supplied an obvious reason for striking Juror J. from the panel. The court also noted that Juror J. had studied social behavior in college, and that many prosecutors believe the social sciences attract people with more liberal views who are less likely to convict. Moreover, Juror J. had stated in her questionnaire that she believed certain people, particularly Blacks and Hispanics, were treated unfairly by the system.

The court emphasized that it had considered the prosecutor's history of *Batson/Wheeler* violations when it had ruled on the motion, but concluded that in light of all the circumstances, the challenge to a single African-American juror "did not raise the inference of a prima facie case."

During none of these proceedings did defense counsel suggest that the trial court conduct a comparative analysis of the responses given by Juror J. and the jurors who eventually sat on the case.

B. *Prima Facie Case*

Appellant argues that the trial court erred when it found no prima facie case of discrimination as to Juror J. A prima facie case is established when the party raising the issue "produces evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson, supra,* 545 U.S. 170; *People v. Howard* (2008) 42 Cal.4th 1000, 1017 (*Howard*).) We review the court's ruling under the substantial evidence standard, with deference given to the trial court's factual findings. (*People v. Adanandus* (2007) 157 Cal.App.4th 496, 502-503; see also *People v. Bonilla* (2007) 41 Cal.4th 313, 341-342 (*Bonilla*).)

As a threshold matter, appellant suggests that no deference is required because the trial court utilized the wrong legal standard when it considered the prosecutor's hypothetical reasons for excusing Juror J. He submits that by considering such reasons, the court effectively required the defense to prove that discrimination was "more likely than not," a standard that was expressly rejected by the United States Supreme Court in *Johnson*, *supra*, 545 U.S. at pages 166 to 167, and 173.

We disagree. In *Johnson*, the high court clarified that the first prong of *Batson* is satisfied where the record supports an "inference" of discrimination, and rejected California decisions requiring proof of a "strong likelihood" of discrimination, i.e., that a discriminatory purpose was "more likely than not." (*Johnson*, *supra,* 545 U.S. at pp. 168-173; see also *Howard*, *supra,* 42 Cal.4th at p. 1017.) The trial court here was well aware of *Johnson* (which was decided three years before the voir dire in this case)

and specifically articulated the "inference" standard when ruling on the *Batson/Wheeler* motion.[2]

In applying the "inference" standard, a trial court may reasonably conclude that no prima facie case of discrimination has been established when there are "obvious race-neutral grounds" for excusing the juror. (*People v. Davis* (2009) 46 Cal.4th 539, 584; see also *Howard, supra,* 42 Cal.4th at pp. 1018 [no prima facie case where voir dire provided prosecutor with "ample grounds" for excusing juror]; *People v. Williams* (2006) 40 Cal.4th 287, 313 [court should hesitate to infer *Wheeler/Batson* violation when there is a legitimate reason for excusing a juror and no pattern of discrimination].) " ' "When a trial court denies a *Wheeler* motion without finding a prima facie case of group bias, the appellate court reviews the record of voir dire for evidence to support the trial court's ruling. [Citations.] We will affirm the ruling where the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question." ' " (*People v. Hoyos* (2007) 41 Cal.4th 872, 900; see also *People v. Neuman* (2009) 176 Cal.App.4th 571, 579-580.) Substantial evidence supports the trial court's stated conclusion that Juror J. was not a desirable panelist for the prosecution because she had two relatives who had been arrested for drug offenses, and that consequently, no prima facie case had been made.

Appellant argues that the trial court's ruling is unsupported by substantial evidence because the court referred to the "prosecution" of Juror J.'s brother and cousin for drug offenses. He notes that her questionnaire indicated only that they had been arrested and that questioning during voir dire did not clarify whether their cases had proceeded beyond the arrest stage. We are not persuaded. The court's use of the term "prosecution" appears to refer more generally to contacts with the criminal justice system, and does not alter our conclusion that such contacts, when based on illegal drug

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[2] In cases where the voir dire was conducted before *Johnson* and it is unclear whether the trial court applied the correct standard, deference to the trial court is not appropriate and an appellate court must review the record independently to determine whether it supports an inference of discrimination. (*Howard*, *supra*, 42 Cal.4th at p. 1017; *Bonilla*, *supra*, 41 Cal.4th at pp. 341-342.)

use, provide ample reason for excusing a juror in a murder case in which the evidence will show that the defendant was a user of illegal drugs and the victim was a drug dealer.

C. *Comparative Juror Analysis*

Taking a different tack, appellant urges us to conduct a comparative analysis of responses given by non-African-Americans who were seated on the jury to determine whether a prima facie case was made. Although he did not raise this argument in the trial court, he notes that some of the seated jurors had been arrested or convicted of crimes, and that others had family members or friends who had been arrested or convicted of crimes, including drug-related offenses. Appellant relies on recent case law holding that when analyzing the *third* stage of *Batson/Wheeler*, an appellate court must conduct a comparative juror analysis for the first time on appeal if it is relied upon by the defendant to establish discrimination and if the record is sufficient to permit comparison. (*Lenix*, *supra*, 44 Cal.4th at p. 622; *Miller-El v. Dretke* (2005) 545 U.S. 231, 241 (*Miller-El*).)

Our Supreme Court has in several cases declined to engage in comparative juror analysis for the first time on appeal in determining whether a prima facie case was made under the first prong of *Batson/Wheeler*. (See, e.g., *Howard*, *supra*, 42 Cal.4th at p. 1019; *Bonilla*, *supra*, 41 Cal.4th at p. 350; *People v. Bell* (2007) 40 Cal.4th 582, 600-601.) "Whatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his strikes are pretextual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales. . . ." (*Bonilla*, at p. 350; compare *Miller-El*, *supra*, 545 U.S. at p. 241; but see *People v. Cornwell* (2005) 37 Cal.4th 50, 71-72, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 (*Doolin*) [assuming without deciding that comparative analysis may be employed for first time on appeal to determine prima facie case].) Although the Ninth Circuit Court of Appeals has recognized that comparative juror analysis may be applied to the first prong of a *Batson* claim to determine whether "the totality of the circumstances gives rise to an inference of discrimination" (*Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1149; see also *U.S. v. Collins* (9th Cir. 2009) 551 F.3d 914, 921-922), this court is bound to follow the

decisions of the California Supreme Court (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455).

Appellant argues that we must conduct a comparative juror analysis under the third prong of *Batson/Wheeler* because the trial court made a stage-three finding on the ultimate issue of discrimination. (See *Hernandez v. New York* (1991) 500 U.S. 352, 359 ["Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot"]; *People v. Lewis* (2008) 43 Cal.4th 415, 471.) Appellant notes that after the prosecutor explained his challenge to Juror J., the court commented, "[T]he reasons provided are race neutral and are not a sham or a pretext, but are the actual reasons that [the prosecutor] exercised the peremptory challenge."

We do not agree that this statement by the trial court transformed this from a "first-stage" case to a "third-stage" case. "When the trial court expressly states that it does not believe a prima facie case has been made, and then invites the prosecution to justify its challenges for the record on appeal, the question whether a prima facie case has been made is not mooted, nor is a finding of a prima facie showing implied." (*Howard*, *supra*, 42 Cal.4th at p. 1018.) But even if we were to treat this as a stage-three case and engage in comparative juror analysis, reversal is not required.

A trial court's stage-three finding must be affirmed if it is supported by substantial evidence. (*People v. Cruz* (2008) 44 Cal.4th 636, 661 (*Cruz*).) We presume the prosecutor acted in a constitutional manner, "giv[ing] great deference to the trial court's ability to distinguish bona fide reasons from sham excuses." (*People v. Burgener* (2003) 29 Cal.4th 833, 864.) Though a comparative analysis must be conducted for the first time on appeal when the record permits, a reviewing court faces inherent limitations in attempting to conduct an analysis on a cold appellate record. (*Lenix*, *supra*, 44 Cal.4th at p. 622; *Cruz*, *supra*, 44 Cal.4th at p. 659.) Our obligation to perform a comparative analysis does not supplant the requirement that we " 'accord significant deference to the factual findings on the question of discriminatory intent.' " (*Cruz*, at p. 659.) This

deference seems particularly appropriate in this case, because the trial court had previously granted a *Batson/Wheeler* motion and was obviously sensitive to the issue.

Here, the prosecutor explained that he was excusing Juror J. for several reasons: her brother and cousin had been arrested on drug offenses, and her brother, in particular, was a very close relative; she had several relatives who had used crack cocaine; she had indicated she did not know the crime appellant was charged with committing, even though the charges had been read to the panel; and her responses on the questionnaire were arguably inconsistent. These were nondiscriminatory reasons and we defer to the trial court's determination that they were genuine. (*Cruz*, *supra*, 44 Cal.4th at p. 659; see also *People v. Silva* (2001) 25 Cal.4th 345, 386.)

We turn now to the questionnaires of the seated jurors that appellant asks us to examine and compare to Juror J.'s responses. Juror No. 68 had been arrested and charged with driving under the influence in 1995 and had a niece and friend who had drug problems. Juror No. 81, who was 56 years old at the time of the trial, had been convicted of a shoplifting offense at age 19. Juror No. 35 had been twice arrested and charged with driving under the influence in the 1980s, and had tried drugs when he was in his twenties. Juror No. 11 had a niece who had been charged with an offense involving illegal drugs and had been in and out of rehabilitation. Juror No. 66 knew a coworker who was addicted to drugs. Juror No. 74 had a brother who had gone to prison for fleeing from a traffic arrest and a cousin who was addicted to crack cocaine and who "lies[,] cheats, steals & prostitutes to get money for drugs. We all hate her calling us with trumped up stories, e.g., 'I have bone cancer and need money for treatment.' " Juror No. 29 had an 80-year-old brother who had been arrested for an unknown offense when he was young and had two in-laws with drug problems.

None of these responses undermines the prosecutor's reasons for challenging Juror J. (See *Cruz*, *supra*, 44 Cal.4th at p. 661.) It is true that some of the seated jurors had contacts with the criminal justice system, and others had family members, friends or acquaintances who had problems with illegal drugs. But Juror J.'s situation was different, in that she had "several" family members who had a problem with crack

cocaine, and a very close family member (a brother) who had been arrested for a drug related offense. She also stated in her questionnaire that she had "friends" who had been arrested for the same reason. Drug use did not appear to be nearly as pervasive in the social circles of the seated jurors, and the prosecutor could quite reasonably differentiate between her responses and those of the seated jurors. Substantial evidence supports the trial court's finding that the prosecutor did not excuse Juror J. based on her race. (*Ibid.*)

Our conclusion renders moot the question of whether a comparative analysis would support an inference of discrimination at the first stage of *Batson/Wheeler*. Even if we were to assume that such an analysis were appropriate in a stage-one case, our determination that the trial court properly ruled on the ultimate issue of discrimination would render it unnecessary to consider the preliminary issue of whether a prima facie case was established. (See *Hernandez*, *supra*, 500 U.S. at p. 359; *Lewis*, *supra*, 43 Cal.4th at p. 471.)

II. *Search of Appellant's Jail Cell*

Appellant contends his convictions must be reversed because the prosecution searched his jail cell and in so doing violated his constitutional rights to a fair trial, to assistance of counsel, and to be free from unreasonable searches and seizures. We reject the claim.

A. *Procedural History*

A few days before the trial began, appellant was placed in a visiting room at the jail where he was being housed while two investigators from the District Attorney's Office conducted a warrantless search of his cell. The defense brought the issue to the court's attention, at which point the prosecutor asked to speak to the court outside the presence of defense counsel to discuss the reasons for the search. The court held an in camera hearing over defense counsel's objection.

At that hearing, a redacted transcript of which was later provided to defense counsel and which is now a part of the record on appeal, the prosecutor explained that he had been contacted by an attorney whose client had information suggesting that appellant was attempting to tamper with Ami Jurica, the prosecution's main witness. In response

to this report, two investigators from the District Attorney's office searched appellant's cell and seized a letter from a Debbie O. (apparently a friend or acquaintance of appellant's), which was of some concern because Ms. O. lived in Idaho, the same state as Jurica. The court ruled that the defense was entitled to any documents that had been seized.

Defense counsel filed a motion to dismiss the charges and/or suppress evidence, arguing that the search of the jail cell had violated appellant's Sixth Amendment rights to a fair trial and assistance of counsel by giving the prosecution access to privileged information. (U.S. Const., 6th Amend.) The motion also challenged the search on Fourth Amendment grounds and sought recusal of the prosecutor because he had allegedly obtained access to attorney-client communications between appellant and his appointed counsel. (U.S. Const., 4th Amend; Evid. Code, §§ 950-956.5.)

The motion to dismiss was accompanied by a declaration by appellant, stating that after the cell search, he discovered that at least 20 pages of notes relating to trial preparation were missing, as was at least one report prepared by defense investigators and various other private papers. Also attached was a declaration by Kelly Whitney, a private investigator whose partner had been working for appellant's defense. Whitney stated that while waiting for her partner outside the courtroom on the date of the in camera hearing, she saw the prosecutor leave the courtroom and make a call in the hallway. "I heard him say, "Hey Man, still no reports, pictures or' . . . and a third word that I am unsure of. The third word was something to the effect of documents or photos. Then he concluded the sentence by saying, ri-ight.' The strong inflection of the word 'right' did not sound like a question. It sounded like [the prosecutor] was telling the person on the other end of the line that he preferred there to still be no reports, pictures or ____ (whatever the third item was that he said)."

The court held a hearing at which Inspector Sanchez, one of the two investigators who had searched appellant's cell, was called as a witness. Sanchez testified that they were investigating possible threats against a witness in appellant's case, rather than the underlying crimes. They conducted the search based on information they obtained from

an interview they conducted at the jail, not on the prosecutor's instructions. The only items seized from the cell were a letter and an envelope, and the investigators did not take photographs of any documents. Sanchez acknowledged that they went through other documents in the cell to determine their nature, but they were not looking for legal documents and did not read any legal documents.

Appellant was called as a witness and testified that other papers were missing from his cell following the search. James Baxter, a jail inmate housed on the same module as appellant, testified that he saw the investigators enter appellant's cell and saw flashing lights inside the cell.

The trial court denied the motion to dismiss but granted the motion to suppress. It found credible Sanchez's testimony that the investigators had not seized any documents other than the letter from Debbie O. and an envelope. It concluded that no Sixth Amendment violation had occurred, but to avoid any potential violation of the right to counsel, the investigators who searched the cell were ordered not to communicate the results of their search to the prosecutor. The court ordered that items seized from the cell and any fruits of the search would be suppressed, and that no further searches of appellant's jail cell would be conducted by the District Attorney's office without prior permission from the court. No evidence of the search or items discovered during the search was introduced at trial.

Appellant raised the issue of the cell search in his motion for new trial, in which he characterized the search as prosecutorial misconduct. The court denied the motion, reasoning that because the fruits of that search had been suppressed, there could be no prejudice to appellant's Sixth Amendment rights.

B. *Analysis*

Appellant argues that the prosecutor committed misconduct and violated his constitutional rights by directing investigators to search his jail cell. He claims the judgment must be reversed because it was the prosecution's burden to demonstrate that the defense was not prejudiced by the misconduct and the prosecution failed to meet its burden. Appellant is mistaken.

We begin our analysis by noting that persons who are held pretrial in a jail facility have no reasonable expectation of privacy for Fourth Amendment purposes. (*People v. Davis* (2005) 36 Cal.4th 510, 524-529.) To the extent appellant claims misconduct arising from a Fourth Amendment violation, that theory must fail.

Turning to the argument that the search violated appellant's Sixth Amendment right to counsel because it allowed the prosecution to gain access to confidential attorney-client or attorney work-product communications, the trial court specifically found that no such materials were seized. This finding of historical fact is supported by substantial evidence, namely, the testimony of Inspector Sanchez that the only items taken were a letter from Debra O. and an envelope, which clearly did not amount to privileged material. We accord due deference to the trial court's factual determination. (See *People v. Nesler* (1997) 16 Cal.4th 561, 582 [appellate court accepts trial court's credibility determinations in ruling on claim of misconduct by juror]; *People v. Jordan* (1990) 217 Cal.App.3d 640, 646 (*Jordan*) [burden is on prosecution to rebut prima facie case of eavesdropping on attorney-client conversation, but substantial evidence supported trial court's conclusion that prison officials had not heard conversations between the defendant and his attorney].)

In support of his Sixth Amendment claim, appellant places considerable reliance on case law finding a constitutional violation when a representative of the prosecution eavesdrops upon conversations between a criminal defendant and his counsel. (*Barber v. Municipal Court* (1979) 24 Cal.3d 742, 747-748, 750-756 [misdemeanor trespassing convictions of protestors at a nuclear power plant dismissed because undercover officer who infiltrated the group was present during their discussion with counsel after their arrest]; *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1255, 1259-1261 [dismissal required when prosecutor directed investigator to eavesdrop on conversations between defendant and counsel].) This case does not present comparable facts because there was no showing that the prosecution gained access to privileged information. (Compare *Jordan*, *supra*, 217 Cal.App.3d at p. 646.)

Even in cases where the Sixth Amendment has been violated, "absent demonstrable prejudice, or substantial threat thereof, dismissal . . . is plainly inappropriate, even though the violation may have been deliberate." (*United States v. Morrison* (1981) 449 U.S. 361, 365; *People v. Zapien* (1993) 4 Cal.4th 929, 967.) There was no demonstrable prejudice in light of the trial court's determination that no privileged materials were seized, and any substantial threat of prejudice was obviated by the court's order suppressing the fruits of the search.

Appellant claims the record does establish prejudice because (1) the prosecution learned that Jurica's testimony would not change during the retrial; and (2) appellant's belief in the confidentiality of his communications with counsel were shaken. As to the first claim, the lack of any documents directly suggesting that appellant was attempting to influence Jurica's testimony did not "put to rest" the tampering allegation or "remove[] that doubt that the chief prosecution witness would suddenly support the defense theory of self-defense," as appellant now claims. All that can be said is that apparently, the cell contained no written evidence of attempts to influence Jurica. As to the impact of the search upon appellant's relationship with counsel, he has made no showing as to how his subjective mental state actually interfered with his defense. We also question whether the asserted lack of confidence would be reasonable when the court *granted* appellant's motion to suppress the evidence that was seized and ordered the prosecutor to obtain permission from the court before conducting any other searches of appellant's cell. In any event, the trial court found that appellant had not lost faith in his trial counsel as a result of the search, a factual finding to which we defer. (See *Jordan, supra*, 217 Cal.App.3d at p. 646.)

Appellant also contends the trial court applied the wrong legal standard to his motion to dismiss because it did not place the burden on the prosecution to prove the lack of prejudice. "Although . . . federal courts are divided as to whether the defendant or the prosecution has the burden of establishing prejudice arising from governmental intrusion on confidential attorney-client communications, there is *no* dispute as to the duty of the defense to establish, as part of its prima facie case, that confidential information was

actually communicated to the prosecution team." (*People v. Ervine* (2009) 47 Cal.4th 745, 766.) Viewing the evidence in the light most favorable to the trial court's ruling, appellant did not establish that confidential documents were seen by the prosecution. Hence, the burden did not fall upon the prosecution to disprove prejudice.

In a related argument, appellant asks us to review the sealed transcript of the in camera hearing at which the prosecutor explained the reason for the search of the jail cell, to determine whether the identity of the person who provided information about possible witness tampering should have been disclosed to the defense. (See *People v. Hobbs* (1994) 7 Cal.4th 948, 973-974; *People v. Seibel* (1990) 219 Cal.App.3d 1279, 1287, 1294-1295.) The Attorney General agrees that review of the sealed material is appropriate.

Evidence Code section 1041, subdivision (a) provides that a pubic entity has a privilege to refuse to disclose the identity of a person who has furnished information about a crime. Notwithstanding this provision, "the prosecution must disclose the name of an informant who is a material witness in a criminal case or suffer dismissal of the charges against the defendant." (*People v. Lawley* (2002) 27 Cal.4th 102, 159.) "An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant." (*Ibid*.)

Having reviewed the sealed transcript of the hearing (which differs from the redacted transcript made available to the defense only insofar as it deleted information tending to identify the informant and his or her attorney), we conclude there is no reasonable possibility that the informant could have given exonerating evidence on the issue of guilt. Due process did not and does not require that further information be provided to the defense.

III. *Motion to Recuse Prosecutor*

Appellant argues that the judgment must be reversed because the trial court erroneously denied his motions to recuse the prosecutor and his office. We disagree.

A. *Procedural History*

After the court granted a mistrial in response to the *Batson/Wheeler* motion brought during the voir dire of the first jury panel on remand, but before the second jury panel was convened, the defense filed a motion to recuse the prosecutor assigned as trial deputy and the entire Contra Costa County District Attorney's office, alleging a personal bias toward appellant that made it unlikely he could receive a fair trial. The motion cited the prosecutor's history of using peremptory challenges to remove African-American jurors as evidence of this bias. Defense counsel filed a declaration stating the prosecutor had not provided him with discovery in a timely fashion, and that although he attempted to negotiate an agreement allowing appellant to plead guilty to voluntary manslaughter with a waiver of time, no offers were forthcoming from the District Attorney's office. The declaration noted that in the *Johnson* case, which had been handled by the same prosecutor and which was also remanded due to *Wheeler* error, the defendant had been allowed to plead to manslaughter even though he was charged with murdering a child. (*Johnson*, *supra*, 545 U.S. 162.)

The trial court denied the motion to recuse, finding no evidence that Brown was actually biased against appellant or that his continuation on the case would deprive appellant of a fair trial. It concluded that it was unlikely Brown would exercise future peremptory challenges in a discriminatory manner; that in the event of another *Batson/Wheeler* motion the court would protect appellant's rights; and that Brown had been professional and fair in all other aspects of the case and had been forthcoming with discovery. The court further found no evidence whatsoever that the District Attorney's office as a whole had a conflict of interest. It disagreed with defense counsel that the failure to offer plea bargain indicated bias or a conflict of interest, noting that the district attorney was not required to make an offer; that the court was not in a position to second-guess such decisions; and that in light of the conviction for second degree murder during the first trial, it was not irrational to proceed to trial and seek the same result.

After it came to light that appellant's jail cell had been searched, appellant filed a motion to dismiss the case and/or suppress the fruits of that search, and again sought recusal of the prosecutor and his office.

The trial court denied that motion as well, and, following the verdict, denied a motion for new trial based in part on the failure to recuse.

B. *Analysis*

Under Penal Code section 1424, subdivision (a)(1), a motion to recuse a district attorney "may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." This statute "establish[es] a two-part test: (i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting? Thus, while a 'conflict' exists wherever there is a 'reasonable possibility that the [district attorney's] office may not exercise its discretionary function in an evenhanded manner,' the conflict is disabling only if it is 'so grave as to render it unlikely that the defendant will receive fair treatment.' " (*People v. Eubanks* (1996) 14 Cal.4th 580, 594.) The moving party bears the burden of showing that recusal is required (*Love v. Superior Court* (1980) 111 Cal.App.3d 367, 372), and disqualification of an entire district attorney's office is disfavored (*People v. Merritt* (1993) 19 Cal.App.4th 1573, 1578; *People v. Hernandez* (1991) 235 Cal.App.3d 674, 679-680).

We review a trial court's ruling on a motion to recuse for an abuse of discretion. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711 (*Haraguchi*); *Hollywood v. Superior Court* (2008) 43 Cal.4th 721,728.) "The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence,[] its conclusions of law are reviewed de novo,[] and its application of the law to the facts is reversible only if arbitrary and capricious.[]" (*Haraguchi*, at pp. 711-712, fns. omitted.)

In *People v. Turner* (1994) 8 Cal.4th 137, 152, 162-164 (*Turner*), overruled on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555, at footnote 5, our Supreme

Court considered a motion to recuse made under circumstances similar to those in the case before us. The defendant in *Turner* argued that the prosecutor should be barred from retrying the capital murder charge against him because his original conviction had been reversed based on *Wheeler* error involving African-American jurors and the prosecutor was currently trying another capital case in which he had exercised 10 of 14 peremptory challenges to strike African-American jurors. (*Turner,* at pp. 152, 162.) Based on these circumstances, the defendant argued that he would likely be denied a trial by a representative cross-section of the community if retried by the same prosecutor. (*Ibid.*)

Rejecting an argument that the trial court had abused its discretion by denying the motion to recuse, the court in *Turner* reasoned as follows: (1) the earlier error by the prosecutor did not necessarily lead to the conclusion that he would fail to make peremptory challenges in an evenhanded manner; (2) the *Wheeler* error leading to the earlier reversal had involved an inadequate explanation of the reasons for striking the jurors, which did not mean he possessed a "vendetta" against African-American jurors as the defense argued; and (3) the defendant could bring a *Wheeler* motion in the event of a perceived violation. (*Turner, supra,* 8 Cal.4th at p. 163.) These reasons apply to appellant's case with equal force, and the trial court here did not abuse its discretion in denying the motion to recuse based on the specter of a future *Batson/Wheeler* violation. (*Haraguchi, supra,* 43 Cal.4th at pp. 711-712.)

Appellant argues that the trial court applied the wrong legal standard when it undertook the two-prong analysis for considering a motion to recuse under Penal Code section 1424. We disagree. The court prefaced its ruling by accurately reciting the test for a disabling conflict of interest under that section, as interpreted by *Eubanks, supra,* 14 Cal.4th 580, showing that it understood and applied the correct standard. Appellant's complaint that the trial court focused on its own ability to curtail any *Batson/Wheeler* error does not persuade us otherwise; it was appropriate for the court to consider the efficacy of alternative remedies when deciding whether recusal was necessary. (See *Turner, supra,* 8 Cal.4th at p. 163.)

Nor did the court abuse its discretion in rejecting the claim that the lack of a plea bargain offer showed a conflict of interest. It is apparent from the record as a whole that the prosecutor took the case to trial because he believed appellant was guilty of second degree murder, a view supported by the conviction of second degree murder obtained during the first jury trial. Indeed, plea bargaining is prohibited on serious felony charges such as murder, "unless there is insufficient evidence to prove the people's case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence." (Pen. Code, § 1192.7, subd. (a)(1).)

As to appellant's claim that the District Attorney's office should have been recused because confidential material was obtained during a search of his jail cell, we have already concluded that the trial court's order suppressing the fruits of that search was adequate to protect his constitutional rights.

For the reasons discussed, we conclude the trial court's denial of the motion to recuse was not an abuse of discretion under Penal Code section 1424. Nor can appellant establish prejudice. Other than citing his unsuccessful challenges to the denial of the *Batson/Wheeler* motion and the motion to dismiss based on the search of his jail cell, appellant does not attempt to explain how he was harmed by the alleged conflict, and it is not reasonably probable he would have obtained a more favorable result if a different prosecutor or prosecutorial agency had stepped in to try the case. (See *People v. Vasquez* (2006) 39 Cal.4th 47, 66-71.) Appellant has also failed to establish a violation of due process because the conduct on which the motion to recuse was based did not deprive him of a fundamentally fair proceeding. (*Id*. at p. 65.)

IV. *Prior Acts Character Evidence under Evidence Code § 1103*

The jury heard evidence that Maldonado always carried a gun with him. Reasoning that this tended to prove Maldonado's violent character under Evidence Code section 1103, subdivision (a),[3] the court allowed the prosecution to present rebuttal evidence of three separate threats that appellant made to custodial guards and a physical

[3] Further statutory references are to the Evidence Code unless otherwise indicated.

altercation between appellant and a fellow inmate. Appellant argues that this evidence should have been excluded because the information about Maldonado's prior gun possession was solicited by the prosecution, not the defense, and because it was offered not to prove Maldonado's bad character, but appellant's own state of mind. (See, e.g., *People v. Tafoya* (2007) 42 Cal.4th 147, 183-184.) We conclude the evidence was properly admitted, but was harmless in any event.

Section 1103 provides in relevant part, "(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 [generally barring character evidence to prove conduct on a specific occasion] if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character. [¶] . . . . [¶] (b) In a criminal action, evidence of the defendant's character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a)."

Thus, in a prosecution for a homicide or an assaultive crime where self defense is raised, evidence of the violent character of the victim is admissible to show that the victim was the aggressor. (*People v. Blanco* (1992) 10 Cal.App.4th 1167, 1169, 1175-1176; *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 446, fn. omitted.) Such evidence opens the door to rebuttal evidence by the prosecution showing a defendant's violent character. (*Blanco*, at p. 1169.) We review a trial court's decision to admit character evidence for abuse of discretion. (*Doolin*, *supra*, 45 Cal.4th at p. 437.)

We reject appellant's contention that the evidence of Maldonado's proclivity for carrying a gun was elicited solely by the prosecution and therefore was not "adduced by

the defendant" under section 1103, subdivision (b). Appellant testified during direct examination that he "always" saw Maldonado with a gun before the day of the shooting. Additionally, defense counsel objected to the prosecutor's efforts to redact statements about Maldonado's prior gun possession from videotaped police interviews of Ami Jurica and John Marshall that were introduced into evidence by stipulation of the parties.[4]

Because appellant "adduced" the evidence that Maldonado always carried a gun, we consider its relevance to show that "the victim had a character for violence or a trait of character tending to show violence," thus triggering the prosecution's right to present rebuttal evidence under section 1103, subdivision (b). Maldonado's practice of carrying a gun on other occasions was specific-act character evidence that tended to show he acted in conformity with that character trait on the day he was shot—that he was more likely to have been carrying a gun—and section 1103, subdivision (a) authorized the admission of the evidence for that purpose. But it was not disputed that Maldonado had a gun with him on the day he was shot, and his history of gun *possession* did not itself include any violent acts that made him more likely to be the aggressor in this case. None of the witnesses testified that on any other occasion Maldonado fired his gun, brandished it, or otherwise used it to threaten another person.

We question whether the testimony about Maldonado's prior acts of gun possession, standing alone, was proof he had a "violent" nature and was more likely to have been the aggressor. But other testimony was elicited from Jerry Silva to the effect that Maldonado was a "tough dude" who could handle his business and who was not a man who could be robbed with no consequences. This gave Maldonado's gun possession a more menacing flavor. Looking at the evidence as a whole, we cannot say the trial

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[4] The taped version of Jurica's interview that was played for the jury included her comment that appellant "knows [Maldonado] always carries a gun. Everybody knows that." The tape of Marshall's interview included statement that Maldonado liked to show everyone he had a gun and that he always kept it with him. "Matter of fact, he once told me that he even took a shower with it in a [plastic] bag." Although defense counsel referred to the interview of Wendy Nguyen when making his objection, it was Jurica's interview that contained statements about Maldonado's gun use.

court abused its discretion in ruling that Maldonado's prior gun possession indicated a "trait of character tending to show violence." (§ 1103, subd. (b).) The prosecution was entitled to respond to this evidence with proof of appellant's violent character. (*Ibid*.) This is so even if the evidence of Maldonado's prior gun possession was relevant for reasons other than proof of his violent character, for example, to show that appellant, either reasonably or unreasonably, believed he was in danger of being shot when he killed Maldonado. (See *People v. Walton* (1996) 42 Cal.App.4th 1004, 1014-1015, disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3; *People v. Clark* (1982) 130 Cal.App.3d 371, 384, overruled on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 92.)

Even if we assume the court should have excluded the prosecution's evidence under section 1103, subdivision (b), reversal is required only if it is reasonably probable appellant would have obtained a more favorable result absent the error. (Evid. Code, § 353, subd. (b); *People v. Malone* (1988) 47 Cal.3d 1, 22.) We consider the nature of the evidence presented, and conclude there is no reasonable probability it affected the outcome of the case.

The prosecution solicited evidence of four incidents under section 1103, subdivision (b): First, Deputy Stolzman testified that on June 28, 1998, he was working at the jail where appellant was housed. During a laundry exchange of the sheets and clothing in appellant's cell, appellant became hostile and uncooperative and said "I'll beat your fucking ass, motherfucker." Appellant initially resisted being handcuffed, but complied after the deputy threatened him with mace. Second, former correctional officer Rabago testified that when he was working at Solano state prison on January 25, 1988, appellant made some statements to the effect that he would remember all of the "assholes" who gave him a hard time and that every cop in the prison lived within an eight-hour drive and it would not be hard to find them. Third, appellant was asked by the prosecutor on cross-examination about an altercation with another inmate September 2, 1991, while he was incarcerated in state prison. Appellant acknowledged hitting the inmate during a fight, but denied that he committed an assault. Fourth, the prosecutor

asked appellant about a conversation with Officer Duke at the Martinez jail that happened while he was in custody on February 19, 1996. Appellant acknowledged calling Duke a racist and saying "You just met a brother who ain't afraid of you," but denied saying, "You're just a flea and when I smash you I'll forget about you."

Three of the four incidents consisted of verbal threats rather than physical violence and none were particularly prejudicial compared to the severity of the charged offenses. Even without the section 1103, subdivision (b) evidence, the jury would have learned through appellant's own testimony that he had been convicted of felonies and had served time in prison, that he was paroled in May of 1995, just two months before the shooting, that he had been shot several times, that he carried a gun with him despite knowing that it was illegal for him to do so, and that he used illegal drugs and arranged drug deals for profit. The jury's view of appellant would not have been fundamentally changed by the evidence about the four incidents that was introduced under section 1103, subdivision (b).

V. *Cumulative Error*

Appellant claims that even if none of the errors he has alleged requires reversal, their cumulative impact deprived him of a fair trial. We disagree. To the extent we have assumed error, such error was harmless. Reversal is not required, whether the issues are considered individually or collectively. (See *People v. Gutierrez* (2009) 45 Cal.4th 789, 828-829.)

VI. *Credits*

The trial court determined that appellant was entitled to 4,883 actual days of custody credits, but awarded no conduct credits, apparently under the assumption that such credits are barred under Penal Code section 2933.2 when a defendant is convicted of murder. As appellant argues, and as the Attorney General agrees, Penal Code section 2933.2 does not apply to appellant's case, because the murder was committed before the statute took effect in 1998. (See *People v. Donan* (2004) 117 Cal.App.4th 784, 790.) Appellant is entitled to credits under Penal Code section 2933.1, which limits the amount of Penal Code section 4019 presentence conduct credits to 15 percent in cases involving serious felonies.

The parties agree that appellant was in local custody from July 12, 1995 until October 2, 1998 (1,179 days), and from October 13, 2006 until November 21, 2008 (771 days). Appellant is entitled to receive conduct credit equal to 15 percent of each of these two periods, or 291 days total. The Department of Corrections and Rehabilitation, on the other hand, is responsible for calculating any conduct credits to which appellant is entitled for the time served in prison under the original judgment. (See *People v. Buckhalter* (2001) 26 Cal.4th 20, 30-31; *In re Martinez* (2003) 30 Cal.4th 29, 32.)

VII. *Abstract of Judgment*

The parties agree that the abstract of judgment must be corrected to reflect that appellant was convicted of attempted robbery rather than robbery on count two.

DISPOSITION

The superior court shall modify the abstract of judgment to include an award of 291 days of presentence conduct credit and to reflect that appellant was convicted of attempted robbery rather than robbery in count two. A copy of the modified abstract shall be forwarded to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.